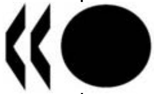

Organisation de Coopération et de Développement Economiques
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DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

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## Working Party No. 2 on Competition and Regulation

# ROUNDTABLE ON COMPETITION AND REGULATION IN RETAIL BANKING

**-- United States --**

**16 October 2006**

*The attached document is submitted by the delegation of United States to the Working Party No. 2 of the Competition Committee FOR DISCUSSION under Item III of the agenda at its forthcoming meeting on 16 October 2006.*

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1. This paper addresses the working relationships that have developed between the Department of Justice's Antitrust Division and the various U.S. banking authorities such as the Federal Reserve, and the manner in which the Department applies general competition law to the banking arena. We will also touch on certain relatively recent developments in the integration of financial services and traditional banking services, and the existence of entry restrictions that can play a role in competitive analysis.

## 1. The Transparency of Bank Merger Review

2. The United States Department of Justice Antitrust Division's Merger Review Process Initiative ("MRPI"), established in 2001, is designed to promote quicker identification of the critical legal, factual and economic issues regarding proposed mergers; more efficient and focused investigatory discovery; and more effective evaluation of evidence.[1] While these are important goals for merger review in all industries, the Antitrust Division's bank merger review process has provided transparency to bankers and a fast track in our merger review for years.[2]

3. The banks that are subject to our bank merger review are keenly aware of the tools we use in our review, but this does not mean we do not periodically revisit our investigative tools to ensure that we are accounting for changes that are occurring in the marketplace. Antitrust merger analysis is sufficiently flexible in that it can readily account for any change in market dynamics. We have great confidence in the soundness of the principles that we use to examine the potential anticompetitive effects of bank mergers and we will continue to evaluate our review process and tailor it, as appropriate, to reflect industry conditions. Before we begin a detailed discussion on Antitrust Division review of bank mergers, it would be helpful to understand the structure of the United States Banking Industry.

## 2. Background on the United States Banking Industry

### *2.1 Structure of the US Banking Industry*

4. Perhaps the most striking aspect of the US banking industry is the sheer number of institutions. There are over 7,900 separately insured banking entities operating in the United States. Almost 1,800 banks have national bank charters, and over 6,000 other banks are chartered by the governments of the fifty states. More than 6,100 of these national and state banks operate as subsidiaries of the over 4,900 bank holding companies. These bank holding companies hold over 97% of all bank assets. One thousand three hundred banks operate independently of holding companies, but most are relatively small, with less than $100 million in assets each. At the state chartering level, the banks can also be broadly divided into groups. About nine hundred of the state chartered banks belong to the Federal Reserve System ("FRS"), the same agency that regulates the bank holding companies. However, the great majority of state banks, some 5,200 in all, are not members of the FRS. The various differences in chartering authority and FRS membership are significant, in part, because they determine which regulatory agency oversees a particular institution.

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1 The Merger Review Process Initiative can be found at: http://www.usdoj.gov/atr/public/9300.htm.

2 Bank Mergers and Antitrust, address by Constance K. Robinson, Director of Operations, Antitrust Division of the U.S. Department of Justice, Before The 31st Annual Banking Law Institute, May 30, 1996. See also, Consolidation in the Banking Industry: An Antitrust Perspective, address by Anthony V. Nanni, Chief, Litigation I Section, Antitrust Division, U.S. Department of Justice, before the Federal Reserve Bank of Chicago 32nd Annual Conference on Bank Structure and Competition, May 2, 1996, and Bank Merger Process Overview: Mergers and Acquisitions in the Financial Services Industry by Maribeth Petrizzi, Chief and Erin Carter Grace, Attorney, Litigation II Section, Antitrust Division, U.S. Department of Justice before the Practicing Law Institute, January 18, 2005.

5. In addition to the nationally- and state-chartered banks, the United States also has about 850 "thrifts"[3] and 8,700 credit unions.[4] These institutions are different from banks in significant ways. Thus, the Department, in analyzing the impact of bank mergers, usually does not give thrifts and credit unions the same weight as banks when reviewing commercial banking markets, because they usually will not be as well-positioned to provide competition in all lines of banking business to ameliorate the effects of a bank merger.

### *2.2 The Statutes Regulating the United States Banking Industry*

6. The banking industry operates under a dual state/federal regulatory system. Both states and federal authorities are empowered to grant bank, thrift, and credit union charters and to regulate their operations. This system provides an incentive for the regulators to continually revise their regulatory practices and procedures as their banks have the ability to switch their primary chartering and regulatory agency among the chartering agencies. However, all bank, thrift and credit union deposit insurance is provided by federally chartered agencies — the Federal Deposit Insurance Corporation and National Credit Union Share Insurance Fund. Over 8,800 FDIC insured bank and thrift institutions in the U.S. operate over 80,000 branches. In addition consumers are served by a network of over 8,700 credit unions, many of which also operate branch networks.

7. Bank Holding Companies ("BHCs") are regulated by the Federal Reserve Board under The Bank Holding Company Act ("BHCA").[5] The BHCA prohibits a BHC from acquiring direct or indirect control of the voting shares of any company which is not a bank. However, the BHCA also allows for exceptions to the preceding by allowing the acquisition of entities that are in businesses "closely related to banking."[6] Thus, this provision has allowed BHCs to engage, through their affiliates, in a variety of closely-related businesses such as mortgage banking, securities trading, a limited range of insurance underwriting, and very limited securities-related activities while preserving the "firewall" between the traditional federally-insured bank and the nonbank affiliates.

### *2.3 Evolution of the United States Banking Industry*

8. The United States banking industry has evolved from a highly regulated industry to an industry that now operates in a more competitive and evolving regulatory environment. In the 1980's and 1990's the banking industry witnessed a breakdown of geographic and product barriers along with the globalization of financial markets and entry into their traditional product markets by nonbank financial service providers. Rapid technological advances, such as point of sale systems ("POS") and on-line banking, hastened the need for regulators and the U.S. Congress to seek dramatic reform in the regulatory environment. Regulators and Congress responded with a series of reforms that eliminated restrictions on deposit prices, types of products offered, geographic operating areas, and lines of commerce. However, Congress has

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3 Thrifts were originally chartered as special purpose depository institutions whose primary function was to accept deposits and invest them in residential mortgages, thus encouraging home ownership. As a result of regulatory reform, the thrift industry has been allowed to broaden its investment portfolio, particularly in the area of commercial lending. References to the U.S. banking industry usually include both traditional banks and thrifts.

4 In 1934, Congress created the credit union system as not-for-profit, member owned depository institutions, that promote consumer thrift. Today credit unions serve nearly 82 million members with deposits exceeding $520 billion and loans over $355 billion.

5 12 U.S.C. § 1841.

6 12 U.S.C. § 1843(c)(8).

chosen to retain the U.S.'s somewhat unique wall between banking and other forms of commerce in that non-banking companies cannot own banks.[7]

9. Probably the most significant alteration to the legal framework governing banking organizations occurred as a result of the enactment of the Gramm-Leach-Bliley Act in 1999 ("GLB").[8] Since the 1930's, federal law had limited the powers of banks to functions that were "closely related to deposit taking and lending." In addition, federal law prohibited banks from underwriting, selling, or distributing securities and also prohibited securities firms from accepting commercial bank deposits.[9] The intent of these restrictions was to prevent the risks associated with underwriting and dealing in securities from undermining the safety and security of the payment systems and the system of federally chartered deposit insurance. GLB repealed those restrictions and created a two-way street wherein banks, securities firms, and insurance companies could affiliate with each other through the financial holding company ("FHC") structure. Today, the over 630 FHCs control over 970 banks. The vast majority of banks in the U.S., however, continue to operate in the traditional structure as members of one of the almost 5,000 bank holding companies. [10]

## 3. Relationship Between the Banking Regulators and the Department of Justice

10. Unlike other industries, bank and bank holding company mergers are exempt from the merger review process under the Hart-Scott-Rodino Act of 1976 ("HSR").[11] Authority to approve or deny banking mergers rests with the bank regulatory agencies. The question of which banking agency has authority is determined by the type of institution which would result from the merger. Thus, if a BHC acquires a FDIC regulated bank, the approval authority rests with the FRB as they are BHC's regulator. The Bank Merger Act[12] ("BMA") and the Bank Holding Company Act[13] require the appropriate regulatory agency to consider the probable competitive effects of proposed mergers and to deny those which threaten competition unless the probable anticompetitive effects of the transaction are clearly outweighed by the probable effect on the convenience and needs of the community to be served.[14] Once the banking agency approves a merger, the Antitrust Division has a 30 day post-approval period in which to file suit under the U.S. antitrust laws (Section 7 of the Clayton Act) to block the transaction. If the Antitrust Division files suit, there is an automatic stay in which parties are barred from consummating the transaction until a

[7] An exception is the special type of bank charter known as an Industrial Loan Company (ILC), which a few states permit. These ILC charters permit non-bank companies, such as BMW or Volkswagen, to perform limited types of banking service such as processing credit cards and accessing the electronic payment systems, and to offer special types of loans, such as financing the purchase/lease of products offered by the company owning the ILC.

[8] Pub. L. No. 106-102, 113 Stat. 1338 (1999).

[9] 12 U.S.C. §§78 and 377 and commonly referred to as the Glass-Steagall Act.

[10] The 630 FHCs account about 84% of all banking assets in the U.S., while the traditional bank holding companies, which are not FHCs, account for about 13% of all banking assets. To become an FHC an entity must first register as a BHC.

[11] Hart-Scott-Rodino Act ("HSR") 15 U.S.C. §18. Mixed transactions, those allowed in the post-Gramm-Leach-Bliley world, may require both a bank merger or holding company application and an HSR for the "non-banking" portion of the transaction. The bank portion of these mixed transactions will be reviewed by the Department but the HSR reportable transaction may be reviewed by either the Department or the Federal Trade Commission.

[12] 12 U.S.C. § 1828(c).

[13] 12 U.S.C. § 1842(c).

[14] 12 U.S.C. §§ 1828(c) and 1842(c).

federal district court conducts a review of the transaction. Antitrust immunity under Section 7 of the Clayton Act accrues if no suit is filed within the 30-day post-approval period.[15]

11. The Antitrust Division is tasked with reviewing all bank merger transactions that are proposed throughout the United States. Banking is unique in many respects, one of which is the regulatory scheme through which banks operate. In addition to the Division, bank agencies are tasked with evaluating the competitive effects of the transaction. Because of this dual review, there is a significant level of inter-agency staff cooperation. While the Division conducts a separate competitive review, we do share with the banking agencies our conclusions and the bases for the conclusions, including divestiture requirements. We may also consult with the agencies on timing, and invite the agencies to have a joint meeting with the parties to discuss a proposed merger. The competitive impact of bank and bank holding company mergers is simultaneously reviewed by the Division and one or more of the four responsible primary banking agencies: the Board of Governors of the Federal Reserve System ("FRB"), the Office of the Comptroller of the Currency ("OCC"), the Federal Deposit Insurance Corporation ("FDIC"), and the Office of Thrift Supervision ("OTS").[16] Under the statutes, the Division must formally comment on the application by issuing a report on the competitive factors.[17] The Department is not required by statute to send a competitive factors report on certain BHC transactions but will if a competitive concern is raised by the transaction.

## 4. United States Competition Law and Its Application to Banking Mergers

12. As discussed above, the banking regulators are the agencies charged with approving or disapproving bank mergers, and the formal notice requirements of the HSR Act, which govern the Department's review of mergers in other industries, do not apply. However, the Department does provide advice to the regulators regarding the likely competitive effects of a given merger, and thus must perform its own independent antitrust analysis. In doing so, the Department uses the basic United States antitrust laws and antitrust analysis used in other contexts. The analysis of banking mergers is different primarily in the amount and type of information available and the tools we use in evaluating this information.

### *4.1 Banking Merger Analysis - Initial Screening Process*

13. As noted, banking mergers are evaluated in much the same way as other mergers. However the basic similarity of the factual issues across the range of banking mergers, and the very large numbers of these mergers that occur every year, have both permitted and necessitated the establishment of certain procedural "shortcuts," without which the efficient review of banking mergers in the United States would be much more difficult.

14. The actual bank merger review process begins when the acquiring party to a merger files an application with its primary regulator, who then sends a copy of the application to the Department. The Department reviews the application through a "screening process." The Department screens approximately 1,000 bank merger applications annually. The screening process is described in detail in a document jointly

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15 12 U.S.C. §§ 1828 (c) and 1849(b).

16 In addition to coordinating with the banking agencies, staff will also conduct joint investigations with State Attorneys General offices in states affected by the merger.

17 12 U.S.C. §1828 (c)(4). See J. Robert Kramer II, *Antitrust Review in Banking and Defense*, 11 Geo. Mason L. Rev. 115 n. 23 (2002). The Department of Justice reviews each proposed transaction and sends one of four competitive factors reports in response: (1) a "not significantly adverse" competitive factors report; (2) a "significantly adverse" letter; (3) a "conditional letter"; or (4) an "advisory report." The most recent significantly adverse letter was sent on September 15, 1999 to the Board of Governors of the Federal Reserve System.

issued in 1995 by the Department, the FRB, and the OCC titled "Bank Merger Competitive Review Screening Guidelines."[18] The purpose of this screening is to identify quickly proposed mergers that clearly do not have significant adverse effects on competition and allow them to proceed.

15. There are two screens used, Screen A and Screen B. Screen A looks at competition on FRB predefined banking markets by calculating the Herfindahl-Hirschman Index ("HHI"), based on deposits in the relevant market with thrifts at 50% weight.[19] The deposit data, by branch, is available from the FDIC[20] so it is easy to tell whether the transaction will raise questions. If the transaction does not result in a post-merger HHI over 1800 with a change of over 200, the banking agencies and the Division are unlikely to further review the transaction. If, however, the proposed merger approaches or exceeds the 1800/200 threshold, the Division will conduct Screen B. Screen B is a calculation of the HHI for commercial banks and thrifts making commercial loans in the relevant market.

16. Unlike the banking agencies, the Division includes thrift deposits in its Screen B calculations at either 100% or 0%, depending on the product market definition at issue. In retail product markets, thrift and credit union deposits are given full weight as these institutions may be alternatives for the customer seeking retail products and service. This is not always the case in small business product markets. In small business lending, the Division generally relies on a "2% test"[21] as a general guideline to determine whether a thrift is an active participant in commercial lending. This test is not a hard and fast rule but rather a screening tool to identify commercial lenders that are not commercial banks. If the relevant product market at issue is small business lending, credit union deposits are not included in this calculation. Experience tells us that credit unions are rarely committed participants in small business lending.

### *4.2 Application of United States Merger Analysis to Banking Mergers*

#### *4.2.1 Investigation Process*

17. Like investigations in other industries, the staff requests information from the parties using a request for information. This request is sent to the merging parties shortly after the Division opens an investigation. Unlike other investigative staffs, our banking unit rarely uses Civil Investigative Demands to request information from the merging parties and relevant third parties. The staff seeks branch level data for each branch in a relevant market, including, location and descriptive information about the location and condition of the branches, amount of commercial & industrial loans and commercial real estate loans, commercial deposits, number of loan officers and branch personnel, and customer contact information. Staff may also request information from regulators and bank examiners on occasion.[22] Staff may also ask the parties to share the information with the banking agency. Staff always has the option of using compulsory civil process if deemed necessary.

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[18] The Bank Merger Competitive Review Screening Guidelines can be found at: http://www.usdoj.gov/atr/public/guidelines/6472.htm.

[19] The HHI is calculated by summing the squares of the individual market shares of the participants.

[20] The Summary of Deposit data is collected annually by the FDIC website at the branch level. The web address is: http://www3.fdic.gov/sod

[21] The "2% test" is measured by the ratio of commercial industrial loans divided by total assets. If the institution exceeds this ratio, its deposits are included in Screen B at 100%. If it does not meet this ratio, its deposits are included at 0%.

[22] Under Section 132 (a) of Gramm-Leach-Bliley Act of 1999, the OCC, OTS, FDIC, and the FRB "shall make available to the [DOJ and FTC].any data in the possession of any such banking agency that the antitrust agency deems necessary for antitrust review." This section also requires confidential treatment of this information.

18. The investigation process in bank mergers is both similar to and different from the merger investigation process used in reviewing mergers in other industries that may result from a filing under the HSR Act. Both bank and non-bank mergers are subject to competitive review under the Division's Merger Guidelines, but they differ because (i) bank merger transactions receive antitrust immunity after the post-approval waiting period expires, (ii) if the Department files suit, there is an automatic stay and a federal district court would conduct a de novo review of the transaction, and (iii) the timetable for bank merger review is defined in the banking statutes. Another difference is that there is a significant amount of public information available for banks that is not available for other industries, such as FDIC Summary of Deposit data[23], bank call reports, and Community Reinvestment Act ("CRA") data.[24] Because of this access to information, the bank merger review process typically is more transparent and predictable.

*4.2.2 Substantive Review*

Background

19. Merging parties in any industry must comply with the requirements of the Clayton Act, which makes illegal any acquisition where the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly. In making this determination, the Department must first decide whether there is a "line of business" – usually referred to as the relevant product market – in which the acquisition will have the effect of lessening competition. The Department must also identify a "section of the country"– usually referred to as the relevant geographic market -- in which the impact on that product market will be felt. Often the geographic market in a particular matter is nationwide, but in other cases, including banking cases, the impact of a merger is felt in much narrower markets, and each must be analyzed separately.

20. Once the relevant product/geographic market has been established, the Department must determine the impact of the acquisition on that market. The first step is to determine the degree of concentration in the market before the acquisition, and the extent to which the acquisition increases that concentration. The concentration measurement most heavily relied on is the HHI, which is based on the squares of market participants' market shares, and is a more robust tool than market shares alone. In most cases, calculation of pre- and post-merger concentrations is only the beginning of the analysis, as it still must be determined whether there are factors in the particular market being analyzed that are likely to make the effect on competition either more or less likely or severe than the concentration numbers alone might predict. Among these factors is the likelihood that entry or the threat of entry will cause market participants to continue to act competitively.

21. If the antitrust evaluation reveals that a particular acquisition is likely to have substantial adverse effects on competition in the relevant market, the Department and the parties must determine if there is a remedy that can be agreed to that will satisfy the Department's concerns. If such a remedy cannot be agreed to, the Department may have to bring a lawsuit to block consummation of the acquisition.

Identifying the Relevant Product and Geographic Markets

22. Unlike the banking agencies, the Division looks at disaggregated product markets because banks are not constrained to raise uniformly the prices of all the services they offer. We do apply the tests as outlined in the merger guidelines.[25] Staff examines separately the range of products offered by banks to

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23 http://www2.fdic.gov/sod/index.asp

24 Community Reinvestment Act (12 U.S.C.§2901 et. seq.) This act is intended to encourage depository institutions to help meet the credit needs of the communities in which they operate.

25 http://www.usdoj.gov/atr/public/guidelines/hmg.htm

retail customers, small businesses, and middle market business, and may also look at syndicated lending[26] and non-bank activities such as custody services, merchant card processing, credit cards and sub-prime lending. The product markets are generally well-defined, so the issue in most mergers is the appropriate geographic market definition.

23. The starting point in a geographic market determination is the FRB-defined banking markets.[27] If there is a Ranally Metro Area ("RMA") within a FRB-defined banking market, we will analyze the effects of the transaction in the RMA.[28] If the FRB market is multi-state, multi-county, or divided by a geophysical barrier (e.g., a river or a mountain range), we might examine the transaction in a more narrowly defined market (i.e. by county).

24. Geographic market definition in our investigation is dependant on the product market at issue. In retail banking, generally, the geographic market is defined by where the customers live and work. Journey-to-work data collected by the Census Bureau may be useful for this determination.[29] For small businesses, customers generally choose a bank that is within a few miles of their business location. We generally view the geographic market as local – often the RMA or the county. The geographic market for middle market customers is generally larger than that for small businesses.[30] Interviews with local bankers, and occasionally customers, help determine geographic markets, local market conditions, and the extent of in-market and out-of-market competition. Also, CRA data can be used to support geographic market definition.

Concentration

25. In addition to measuring market concentration using deposits (as discussed in the section on Initial Screening above), staff will also review other measures of concentration. In particular, staff will review CRA small business lending data, which is publicly available on the county level.[31] This data is collected annually and includes data from all banks meeting certain reporting criteria[32] that are lending in a

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26 Small businesses are generally firms with sales less than $10 million annually seeking extensions of credit less than $1 million. The middle market is generally defined as companies with sales ranging from $10 to $100 million annually with credit extensions ranging from $1 million to $10 million. Syndicated Lending is generally participation in large loans by more than one institution, and is generally for amounts that exceed the level that those institutions are comfortable lending on their own. Syndicated lending includes investment grade, leveraged and highly leveraged loans.

27 http://federalreserve.gov/generalinfo/applications/afi/marketinfo.htm

28 Ranally Metro Area ("RMA") as defined in the "Rand McNally Commercial Atlas and Marketing Guide."

29 http://www.census.gov/population/www/cen2000/commuting.html

30 In the Fleet/Bank of Boston (1999) transaction, DOJ staff had significant concerns over middle market lending in New England. Staff conducted interviews with competitors and customers that strongly suggested that middle market lending was a regional market. Dunn & Bradstreet data confirmed the lack of lending by banks outside of New England. Additionally, Federal Reserve Board studies supported the contention that mid-sized businesses, especially non-public companies, were not solicited by out-of-market banks because limited credit information was available about these customers. Consequently, the divestiture included the entire business unit serving middle market customers.

31 http://www.ffiec.gov/craadweb/aggregate.aspx

32 The Community Reinvestment Act (12 U.S.C.§2901 et. seq.) requires that all institutions regulated by the Office of the Comptroller of the Currency, Federal Reserve System, Federal Deposit Insurance Corporation, and the Office of Thrift Supervision that meet the asset size threshold are subject to data collection and reporting requirements. The asset size threshold that triggers data collection and reporting for all agencies is $1 billion as of December 31 of each of the prior two calendar years.

particular county. CRA data is a great tool to get a "quick look" at the small business lending in a particular county. The CRA data also provides valuable information about out-of-market banks' lending activities in a particular county.

26. Staff will also review information and calculate HHIs using branch concentration data. Branches are probably the most important delivery channel for a bank, particularly for small business lending, and the number of branches a merged entity will have post-merger can provide a glimpse of the competitive effects of the transaction.

Entry

27. There are few remaining regulatory barriers to entry in banking in the United States since passage of the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994,[33] which made it easier for banks to cross state lines. Riegle-Neal permitted bank holding companies to acquire banks in any state and permitted banks to engage in interstate branching if both the "home state" and the "host state" had not opted out of Riegle-Neal by the June 1, 1997 trigger date. States had significant discretion under Riegle-Neal to continue to impose some conditions that could be viewed as barriers to entry, including deposit caps, requirements that banks be in existence for five years before acquiring an out-of-state organization, and restrictions on de novo branching and the acquisition of individual branches. Of the states that opted in to Riegle-Neil, 20 adopted the most stringent requirements, prohibiting de novo entry and the acquisition of a single branch and implementing a five year minimum age requirement before a bank can be acquired by an out-of-state organization.

28. Regardless of these restrictions, entry in local banking markets appears to be driven largely by factors such as growth of economic activity in the area and the current density of banks and branches, not by profitability of incumbent banks or by competition for specific banking products. The Division reviews likelihood of entry, primarily the attractiveness of the area, and not whether an area is "overbanked."

Remedies

29. If the Department concludes that a bank merger will cause a substantial lessening of competition in one or more geographic areas, the Department is usually able to resolve any competitive concerns by coming to an agreement with the merging banks by which the banks will sell off sufficient branches, in the areas where the specific problems exist, that concentration after the acquisition will be at or below acceptable levels. The divestiture requirements are well-established and provide merging parties a measure of certainty on how divestitures will be structured.[34]

30. Generally, the Department requires the branches to be divested to be those belonging to the target, rather than the acquirer, unless the merger involves a clean sweep (e.g. the merging parties are divesting all of one party's branches). We require that any resulting branch network provide broad geographic coverage, and we may prefer that the divestiture include a larger number of smaller branches

33 12 U.S.C. 1811

34 Unlike merger remedies in other industries reviewed by the Department, in banking, the terms of the divestitures are memorialized in a Letter of Agreement ("LOA") rather than a consent decree. The LOA will usually require the merged bank to: divest customer relationships associated with the divested branches; sell closed branches (real estate without loans or deposits) to other commercial banks; suspend non-compete agreements with loan officers and branch managers; and manage the branches as currently managed, including refraining from taking any actions that would encourage customer run-off. The LOA is incorporated into the relevant bank agency's order. Staff always has the option of using civil process and consent decrees if deemed necessary.

than a smaller number of large branches. The branches must be in good condition, in good locations and have a good mix of commercial loans, industrial/commercial real estate loans, and commercial deposits. The parties are required to divest all of the loans and deposits associated with the branch to be divested. It is generally the parties' responsibility to select a divestiture package that will meet the Department's requirements, but we may require substitutions to branches in the parties' proposed package to achieve the mix of branches and loans necessary to resolve the Department's concerns.

31. The Department and the banking agencies must approve any buyer. The buyer must be an active commercial lender, or if it is not, then the buyer must demonstrate plans to enter small business lending. If the buyer is unable to meet these requirements, the Department may reject the buyer. Staff will review business plans, product offerings, and the staffing and backroom support available to the buyer.

32. If a transaction raises competitive concerns but those concerns are not sufficient to require a divestiture, the Department may impose a non-divestiture remedy (e.g., a requirement that the parties sell or lease any branch they close in a relevant market for a three year period after the consummation of the transaction). Physical branches, even absent deposits and loans, are valuable assets, particularly in fast-growing markets, and making existing branches available for purchase may facilitate entry or expansion because the facility is already set up for the business of banking with teller cages, a vault, drive-thru lanes, and the like. Also, existing branches may be prime real estate in commercially active areas which make them attractive for new entrants or expansion by in-market banks.

## 5. Conclusion

33. The Antitrust Division believes that all parties involved in banking industry mergers benefit from our policies of transparency and of working with the other federal agencies, state officials and the merging banks: the governmental agencies get the needed information more quickly; the merging banks are more likely to receive uniform substantive antitrust review from the various governmental agencies involved; and consumers of banking services are properly protected from any potential competitive harm that might otherwise have resulted from the merger of competing banks.